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Supreme Court, U.S.
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No. 90-727

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT G. HOLMES, JR.,
Petitioner,
vs.
SECURITIES INVESTOR PROTECTION CORPORATION, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did the District Court err in granting summary judgment to Petitioner, Robert G. Holmes, Jr., when it held that Respondent, Securities Investor Protection Corporation, must be a "purchaser or seller" of securities in order to maintain an action under 18 U.S.C. §1964(c), which provides that "any person" may sue to recovery for an "injury to his business or property" which is "by reason of" any offense "involving fraud in the sale of securities . . . punishable under any law of the United States," mail fraud, or wire fraud carried out in violation of 18 U.S.C. §1962?

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Securities and Commercial Law Attorneys (NASCAT), by counsel and pursuant to Rule 37.3 of this Court, hereby files its *amicus curiae* brief in support of Respondent, the Securities Investor Protection Corporation (SIPC). For the reasons set forth herein, NASCAT supports affirming the decision of the court below.

NASCAT is an association of nearly 500 attorneys who litigate antitrust, commercial, consumer and securities fraud class action and derivative cases in federal and state courts throughout the country. NASCAT and its members are devoted to representing victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity in cases that have the potential for advancing the state of the law, educating the public, modifying corporate behavior, and/or improving the access of victims to justice and compensation for the wrongs that have been inflicted upon them.

NASCAT's members have litigated (and are presently litigating) numerous treble damage civil actions arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-1968. NASCAT has found civil RICO actions to be the only remedy that a wide range of the American people, ranging from small businesses to the elderly, have to obtain adequate redress when they are cheated by fraud or criminal behavior, including securities fraud schemes which, unfortunately, are rampant in today's society. In order to ensure that the access to justice and adequate compensation which Congress expressly provided in RICO's civil remedy provisions, 18 U.S.C. §1964, is neither narrowed nor foreclosed but, rather, is nurtured and interpreted in accordance with its remedial purpose, NASCAT believes that the decision of the court below should be affirmed and the standing limitation which Petitioner seeks to impose in civil RICO cases should be rejected.

ARGUMENT

A. PRIVATE CIVIL RICO ACTIONS ARE AN ESSENTIAL WEAPON IN SOCIETY'S ARSENAL OF REMEDIES AGAINST CRIMINAL AND FRAUDULENT ACTIVITY, INCLUDING SECURITIES AND CONSUMER FRAUD

We live today in a society whose landscape is littered by frequent, costly and life-threatening failures of financial institutions of catastrophic proportions, many of which have been caused by fraudulent and criminal activity.[1] The past twenty years have witnessed innumerable financial scandals of immense proportions, accompanied in some cases by criminal indictments, guilty pleas, trials and jail sentences and resulting in multi-billion dollar losses to innocent investors involving the infamous Drexel Burnham Lambert,

[1] The financial costs incurred by society as a result of fraudulent activity are enormous. In 1974, the United States Chamber of Commerce estimated that approximately $42 billion was lost to fraud per year. Chamber of Commerce of the U.S., *A Handbook on White Collar Crime: Everyone's Problem, Everyone's Loss* 6 (1974). A decade later, the Attorney General of the United States observed that white-collar crime, principally fraud, costs society nearly $200 *billion* annually. 1985 Att'y Gen. Ann. Rep. 42; *see also White Collar Crime: Hearing Before the Senate Committee on the Judiciary*, 99th Cong., 2d Sess. Parts I-III (1985). That now-dated annual loss figure is similar in dimensions to our nation's drug problem, which is most often described as an epidemic. *See, e.g., Drug Enforcement: Hearings on H.R. 526 Before Subcommittee on Crime of the House Committee on the Judiciary*, 99th Cong., 2d Sess. 1 (1986) (remarks of Rep. William J. Hughes) ($110 billion spent annually on drugs while lost productivity costs approximately $60 billion); *The Cost of Drug Abuse, $60 Billion a Year*, N.Y. Times, Dec. 5, 1989, at D1, col. 1 (stating that the "cost of illicit drugs to American society [is] far more than $60 billion annually").

Inc.[2] and its junk bond guru, Michael R. Milken,[3] as well as other Wall Street investment banks and brokerage houses[4] and so-called "financiers" including Ivan F. Boesky[5] and

[2] The highest-flying investment banking firm of the 1980's, Drexel pled guilty to federal felony securities fraud charges and paid $650 million in fines and sanctions, *see SEC v. Drexel Burnham Lambert, Inc.*, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,999 (S.D.N.Y. Sept. 7, 1988) (filing of enforcement action); *SEC v. Drexel Burnham Lambert, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,474 (S.D.N.Y. June 20, 1989) (entry of consent decree); Cohen, *With Signed Checks, Formal Guilty Plea, Drexel Ends Ordeal*, Wall St. J., Sept. 12, 1989, at A3, col. 4 (Drexel's guilty plea to criminal charges), while its subsequent and costly bankruptcy is still being resolved.

[3] Milken, the most notorious "financier" of the 1980's and possibly the foremost financial criminal mastermind since the equally infamous Charles Ponzi, *see generally* D. Dunn, *Ponzi, The Boston Swindler* 247-48 (1975), was indicted on 98 counts of RICO and criminal securities fraud, pled guilty to six counts and was recently sentenced to ten years' imprisonment. *See "Junk Bond" Leader Is Indicted by U.S. in Criminal Action*, N.Y. Times, Mar. 30, 1989, at A1, col. 6 (reporting 98-count indictment against Milken); *SEC v. Milken*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,200 (S.D.N.Y. Apr. 24, 1990) (settlement of civil enforcement action against and guilty plea by Milken); Cohen, *Milken Pleads Guilty to Six Felony Counts*, Wall St. J., April 25, 1990, at A12, col. 6 (reporting guilty plea); *United States v. Milken*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶95,770 (S.D.N.Y. Nov. 23, 1990) (detailing findings of Milken's wrongdoing from *Fatico* hearing).

[4] The inside trading and other scandals which rocked Wall Street in the 1980's also trapped Kidder Peabody & Co., *see* N.Y. Times, June 5, 1987, at 1, col. 2 (Kidder, Peabody pays $25.3 million to settle insider trading charges), while E.F. Hutton & Co. also acknowledged systemic criminal behavior, *see Why the E.F. Hutton Scandal May Be Far From Over*, Bus. Wk., Feb. 24, 1986, at 98, col. 1 (E.F. Hutton pleads guilty to 2,000 counts of mail and wire fraud in multi-million dollar bank scam); *see also White Collar Crime (E.F. Hutton): Hearings Before the Senate Judiciary Committee*, 98th Cong., 2d Sess. 132 (1986) (Sen. Joseph R. Biden: "Where I come from that is called 'theft.' " Robert Foman, chairman of E.F. Hutton Group, Inc.: "It is probably not different").

[5] The Wall Street inside trading scandal resulted in the indictments, guilty pleas and/or trials, and criminal sentencing of some of Wall Street's most prominent investment bankers and traders, including arbitrageur Ivan F. Boesky, *see SEC v. Boesky*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,991 (S.D.N.Y. Nov. 14, 1986) (Boesky's consent to entry of

(continued)

Dennis Levine,[6] the savings and loan (or ironically named "thrift") industry,[7] procurement scandals involving defense

(fn. continued)
permanent injunction); *N.Y. Times*, Apr. 24, 1987, at 29, col. 6 (reporting Boesky guilty plea); 133 Cong. Rec. H8841 (daily ed. Oct. 20, 1987) (remarks of Rep. John Conyers) (discussing securities fraud, including a detailed analysis of many of the mergers and alleged inside trading involving Boesky); *United States v. Boesky*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,417 (S.D.N.Y. Apr. 26, 1989) (reduction in Boesky's sentence as a result of his cooperation with prosecutors).

[6] The downfall of celebrated Drexel deal-maker and inside trader Dennis Levine has been well documented. *See SEC v. Levine*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,717 (S.D.N.Y. May 12, 1986) (filing of SEC enforcement action); *SEC v. Levine*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,761 (S.D.N.Y. June 5, 1986) (Levine's consent to entry of injunction); *SEC v. Levine*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,534 (2d Cir. Aug. 2, 1989) (tracing enforcement action against Levine); D. Frantz, *Levine & Co.: Wall Street's Insider Trading Scandal* (1987) (recounting the investigation and prosecution of Levine, Martin Siegel and Boesky); M. Stevens, *The Insiders: The Truth Behind the Scandal Rocking Wall Street* (1987) (telling the story of Levine's investigation and prosecution).

[7] Numerous shareholder and derivative suits have been brought by the Resolution Trust Corporation (RTC), creditors and innocent investors (including shareholders and bondholders) against the owners, operators, insiders, professional advisers and affiliates of numerous savings and loan institutions which failed as a result of insider abuse, engaging in fraudulent transactions and ill-advised and excessive "direct" investments, including the purchase of billions of dollars of "junk bonds" peddled by Drexel/Milken. *See* Note, *Insider Abuse and Criminal Misconduct in Financial Institutions: A Crisis?*, 64 Notre Dame L. Rev. 222 (1989); J. Adams, *The Big Fix: Inside the S&L Scandal* (1990); S. Pizzo, M. Fricker & P. Muolo, *Inside Job: The Looting of America's Savings and Loans* (1989). President Bush told the nation that "unconscionable risk-taking, fraud, and outright criminality [were] factors" that led to the savings and loan crisis. Dowd, *Bush Savings Plan Calls for Shaving the Cost Broadly*, N.Y. Times, Feb. 7, 1989, at D9, col. 1. Congressional and other Government studies support the President's harsh judgment, concluding that at least one-third of all bank failures and three-quarters of thrift failures involve the criminal activity of insiders. *See* H.R. Rep. No. 1088, 100th Cong., 2d Sess. 2-13 (1988) (stating that criminal misconduct by insiders is a major contributing factor in approximately one-third of all commercial bank failures and three-fourths of all thrift failures); Office of Comptroller of the Currency,
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contractors,[8] the recent failure of pension funds and insurance companies,[9] as well as less publicized (but certainly no

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Bank Failure: An Evaluation of the Factors Contributing to the Failure of National Banks 9 (1988) (finding that insider abuse is a significant factor in 35% of all commercial bank failures).

[8] Since 1988, when the Justice Department's Operation Ill Wind began operation, numerous defense contractors, their employees and Beltway "consultants" have pled guilty to federal criminal charges stemming from bribery of government officials to secure inside information about pending defense contracts. *See* Lewis, *Ex-Naval Official Makes Guilty Plea In Bid-Rigging Case*, N.Y. Times, June 15, 1991, at A-1, col. 4 (announcing former senior Pentagon official's guilty plea to federal conspiracy and bribery charges and noting that "[w]ith [Melvyn R.] Paisley's plea, 41 individuals and 5 corporations had pleaded guilty to charges that have portrayed a flourishing system involving consultants, usually former Pentagon officials, selling information gained from former colleagues in the Government to contractors"); Pasztor, *Unisys Agrees To Settlement In Ill Wind Case*, Wall St. J., June 10, 1991, at A-3, col. 1 (announcing Unisys' agreement to pay $190 million to settle criminal charges arising out of Ill Wind investigation); Pasztor, *Prosecutors Close in on Unisys, Other Contractors As Arms-Procurement Inquiry Gains Momentum*, Wall St. J., Jan. 8, 1990, at A14, col. 1 (providing a scorecard on Operation Ill Wind: Emerson Electric entered a guilty plea and agreed to a $2 million settlement; Teledyne, Inc. entered a guilty plea and agreed to an $8.3 million settlement; Whittaker Corp. entered a guilty plea and agreed to a $7 million settlement; and Loral Corp. entered a guilty plea and agreed to a $10.5 million settlement). Notable among these cases is Northrop Corporation's 1989 indictment and subsequent guilty plea to federal criminal charges. Northrop shareholders recently settled a civil RICO derivative suit accusing company officials of numerous episodes of criminal wrongdoing in the 1980's, including the payment of bribes in 1983-84 to South Korean government officials in an unsuccessful attempt to entice them to buy Northrop's ill-fated F-20 Tigershark fighter. *See Northrop Proposes $18 Million Settlement*, N.Y. Times, May 25, 1991, at 19, col. 1. Northrop, of course, is a recidivist offender, having pled guilty in the mid-1970's to similar charges arising out of the payments of bribes to foreign governments in order to secure contracts to sell fighter aircraft. *See* J. Noonan, *Bribes*, 656-657 (1984).

[9] The recent collapse and seizure of California-based insurers First Executive Corporation and First Capital Corporation stemming from their excessive investments in Drexel-underwritten and Milken-brokered junk bonds, *see* Berg, *Shielding Insurer From Its Parent*, N.Y. Times, June 1,
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less noteworthy) consumer fraud scandals[10] which occur with increasing frequency. The costs to our society[11] and

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1991, at 17, col. 4, has panicked their policyholders, many of whom are elderly. Unfortunately, the most recent insurance company collapses are but part of a trend which can only worsen because insurers improvidently purchased 30% of the junk bonds in the United States, while pension funds own another 15%. *See* Rosen, *Your Money: Are the Insurers Fiscally Strong?*, N.Y. Times, Jan. 6, 1990, at 34, col. 1. Congressional studies have pointed out clear parallels between the thrift crisis and the ripening insurer crisis. *See* Subcomm. on Oversight and Investigations of the House Committee on Energy and Commerce, 101st Cong., 2d Sess., *Failed Promises: Insurance Company Insolvencies* iii (Comm. Print 1990) (Chmn. John D. Dingell: "The parallels between the present situation in the insurance industry and the early stages of the savings and loan debacle are both obvious and deeply disturbing. They encompass scandalous mismanagement and rascality by certain persons entrusted with operating insurance companies, along with an appalling lack of regulatory controls to detect, prevent, and punish such activities").

[10] *See, e.g., Combs v. Bakker*, 886 F.2d 673 (4th Cir. 1989) (reinstating civil RICO suit against fallen evangelist Jim Bakker and his associates for fraudulently selling 55,000 "lifetime" partnerships in his ministry); Gottschalk, *Churchgoers Are the Prey As Scams Rise*, Wall St. J., Aug. 7, 1989, at C1, col. 3 (reporting that "[m]ore than 15,000 Americans lost a total of $450 million in five years of bogus money-making schemes promoted by religious charlatans," according to the North American Securities Administrators Association and the Council of Better Business Bureaus); *Guilty Plea by Ex-Officer of Beech-Nut*, N.Y. Times, Nov. 14, 1989, at D1, col. 6 (reporting that the president of Beech-Nut Nutrition Corp. pled guilty to selling sugar water as apple juice for babies to consumers).

[11] For example, to deal with the savings and loan crisis Congress enacted special legislation, estimated to cost as much as $500 *billion* over thirty years, to rescue more than 350 troubled thrifts. *See* Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (FIRREA) (amending scattered sections of 12 U.S.C.); Quint, *New Estimate on Savings Bailout Says Cost Could Be $500 Billion*, N.Y. Times, Apr. 7, 1990, at A1, col. 1 (reporting estimates of General Accounting Office over 30-year period). In fact, the cost of the savings and loan bailout cannot presently be estimated. Labaton, *New Finance Woe: F.D.I.C. Loss Worse; S&L Crisis Deeper*, N.Y. Times, June 11, 1991, at A-1, col. 1.

legal system[12] and the concomitant loss of investor confidence in public institutions, most notably the securities markets, cannot be accurately measured.[13] Similarly, the

[12] Pending cases seeking redress for fraudulent activity in the "thrift" industry have been brought by the Federal Deposit Insurance Corporation (FDIC) and the RTC, as well as innocent investors who have been tragically defrauded of their life's savings, including such pending civil RICO actions as *In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation*, MDL Docket No. 834 (D. Ariz. pending), where the RTC and nearly 23,000 elderly Southern California residents jointly seek to recover damages of $500 million, the fruits of an elaborate securities fraud scheme masterminded by notorious thrift looter Charles H. Keating, Jr., who utilized political influence to hold off regulatory censure or seizure of Lincoln Savings (through such means as improperly influencing members of Congress, including "the Keating Five") while he peddled worthless junk bonds in Lincoln's branches to specifically targeted elderly victims who thought they were purchasing government-insured subordinated debentures. The *ACC/Lincoln Savings* class action, which targets three "national" accounting firms (Arthur Andersen & Company, Arthur Young & Company and Touche Ross & Company) and so-called "reputable" law firms (including Jones, Day, Reavis & Pogue) who aided and abetted Keating's fraudulent scheme, and a companion suit brought by the RTC will go to trial in January, 1992.

[13] When Michael R. Milken was indicated, acting United States Attorney Benito Romano observed that "[t]he three-year investigation has uncovered substantial fraud in a very significant segment of the American financial community. A serious criminal problem has infected Wall Street." *"Junk Bond" Leader Is Indicted by U.S. in Criminal Action*, N.Y. Times, Mar. 30, 1989, at A1, col. 6. According to one commentator, the essence of the Government's charges against Milken was his betrayal of his fiduciary obligations to Drexel's clients. Stein, *Betrayer of Capitalism: That Is the Essence of the Government's Charges Against Milken*, Barron's, Apr. 3, 1989, at 7. Trust is the most important element in the free enterprise system and the stock market operates well only when investors have confidence in its integrity. *See* Blakey & Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God — Is This the End of RICO?"*, 43 Vand. L. Rev. 851, 917 (1990). As a result of the recent financial scandals, fewer than one-quarter of all Americans have confidence in banks, insurance companies, or stock brokers. Schwadel, *Consumer Trust: An Elusive Quarry*, Wall St. J., Sept. 20, 1989, at B1, col. 3. Since the October, 1987, stock market crash, small investors' faith in Wall Street has been steadily eroding, *see* Putka, *People Invest Little Faith in Wall Street*, Wall St. J.,

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inevitable and accompanying diminution in public confidence in the professionals who aided and abetted this crime wave, including members of the legal[14] and accounting professions,[15] cannot be estimated with any certainty;

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Sept. 25, 1989, at B1, col. 3, and individual households today own 58.5% of United States stocks compared with 82.2% in 1968, *see* Power, ***Small Investors Are Punier Than Many Think***, Wall St. J., Mar. 28, 1989, at C1, col. 3.

[14] In assessing the causes and impact of the savings and loan crisis, careful attention must be paid to the roles played by professionals — attorneys, accountants, loan brokers, appraisers and investment bankers — who abandoned their professional ethics and willfully joined the "chain of greed" which epitomized the "thrifts' " operations and eventual downfall. *See* Harris, ***The S&L Looters Who May Get Away***, Wall St. J., Feb. 12, 1990, at A12, col. 3 (noting the essential roles played by lawyers who " 'papered' the bogus transactions by drawing up the contracts, and accountants [who] either looked the other way or neglected to scour the institutions' books too carefully"); France, ***Savings & Loan Lawyers***, 77 A.B.A.J. 52 (May 1991) (observing that essential roles were played by attorneys who aided and abetted thrift institutions' criminal wrongdoing). Judge Stanley Sporkin, who tried one aspect of the litigation relating to the catastrophic failure of Lincoln Savings, highlighted in pointed language the role played by professionals who instigated and/or aided and abetted the fraudulent operations of now-failed thrift institutions. *See Lincoln Savings & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) ("Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?")

[15] In reviewing the *amicus curiae* briefs filed in this case by members of the accounting profession, this Court should remain cognizant that running through each of the recent catastrophic scandals is the problem of fraudulent financial reporting, which often causes widespread consequences through a devastating ripple effect. Blakey & Perry, 43 Vand. L. Rev. at 903; *Report of the National Commission on Fraudulent Financial Reporting* 4 (1987). Since 1980, the major accounting firms, all of which piously claim their innocence from wrongdoing in the *amicus curiae* briefs before this Court, have paid millions of dollars to settle liability suits, *see* Wayne, ***Where Were the Accountants?***, N.Y. Times, Mar. 12, 1989, §3, at 1, col. 2 (reporting that Arthur Young & Co. paid undisclosed sums to settle lawsuits arising out of its role in the collapse of Penn Square Bank). Three "national" accounting firms — Arthur Young & Co., Arthur Andersen & Co. and Touche Ross & Co. — have been implicated in the Lincoln

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however, it certainly cannot be ignored.

Government agencies (including SIPC, the FDIC and the RTC), creditors, defrauded investors and injured consumers have had precious few weapons with which to combat this near-tidal wave of corporate criminal wrongdoing, fraudulent activity and resulting multi-billion dollar financial losses occurring over the past 20 years. Certainly one of the foremost weapons available, and one which defrauded private and government plaintiffs have not hesitated to use in the recent past, is the treble damage civil action provided in Section 1964(c) of RICO.[16]

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Savings scandal, *see The Lapses by Lincoln's Auditors*, N.Y. Times, Dec. 28, 1989, at D1, col. 4; Blakey & Perry, 43 Vand. L. Rev. at 888-889 n.108 (detailing allegations of wrongdoing against ACC/Lincoln's auditors, for which they face potential liability exceeding $1 billion), and they face additional litigation and other sanctions as a result of their savings and loan "audits." *See* Berton, ***Big Accounting Firms Face Ban in S&L Bailouts***, Wall St. J., Mar. 14, 1990, at A3, col. 1 (reporting that five of the top six accounting firms were banned by the RTC from doing new work for thrifts because of pending litigation for past faulty audits); Andrews, *U.S. Sues Ernst & Young on Savings Unit Audits*, N.Y. Times, Mar. 3, 1990, at 21, col. 5 (reporting FDIC's suit seeking to recover $560 million against Ernst & Young in connection with its audit of Western Savings Association of Dallas, Texas).

[16] Chapter 96 of Title 18 of the United States Code, 18 U.S.C. §§1961-1968 (1982 & Supp. X), the Racketeer Influenced and Corrupt Organizations Act, which is commonly referred to by the acronym "RICO," was added to Title 18 of the United States Code by Title IX of the Organized Crime Control Act of 1970. Pub. L. 91-452, 84 Stat. 941. RICO takes aim at "racketeering activity," which it defines as any act "chargeable" under severally generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail fraud, wire fraud and interstate transportation of stolen property, and any "offense" involving bankruptcy fraud, "fraud in the sale of securities," or drug-related activity that is "punishable" under federal law. 18 U.S.C. §1961(1). Section 1962, entitled "Prohibited Activities," outlaws the use of income derived from a "pattern of racketeering activity" to acquire an interest in, establish, or operate an enterprise engaged in or affecting interstate commerce; the acquisition or maintenance in any interest in or control of an enterprise through a pattern of racketeering activity; conducting or participating in the conduct of an enterprise through a pattern of

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If history teaches us anything,[17] the overwhelming presence of organized criminal and fraudulent activity in

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racketeering activity; and conspiring to violate any of these provisions. 18 U.S.C. §1962(a)-(d). Congress provided criminal penalties of imprisonment, fines and forfeiture for violation of these provisions. 18 U.S.C. §1963. In addition, it provided a far-reaching civil enforcement scheme in Section 1964, including express authorization for civil suits. *See* 18 U.S.C. §1964(c).

17 When assessing Petitioner's arguments concerning RICO's utility, this Court should note that the pervasiveness of criminal and fraudulent activity in American society was noted more than twenty years ago. Writing in 1967, President Johnson's Crime Commission (also known as the Katzenbach Commission), whose studies led to RICO's enactment three years later, made the following pertinent observations about the effects of fraud upon society and its citizens:

> Fraud is especially vicious when it attacks, as it so often does, the poor or those who live on the margin of poverty. Expensive nostrums for incurable diseases, home improvement frauds, frauds involving the sale or repair of cars and other criminal schemes create losses which are not only sizeable in gross but are also significant and possibly devastating for individual victims.
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> During the last few centuries economic life has become vastly more complex. Individual families or groups of families are not self-sufficient; they rely for the basic necessities of life on thousands or even millions of different people, each with a specialized function, many of whom live hundreds or thousands of miles away.

President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 33-34, 47-48 (1967).

Those who would seek to "reform" RICO or limit the broad reach which Congress intended at the time of its enactment in 1970 are reminiscent of those special interests who sought to emasculate the federal securities laws after their enactment in the early 1930's. As part of President Roosevelt's much-needed New Deal, Congress enacted legislation to deal with securities fraud, precisely because state fraud law was deemed inadequate to deal with "racketeering" on Wall Street. *See, e.g.*, 77 Cong. Rec. 3801 (1933) (remarks of Sen. Duncan Fletcher, leading sponsor of the Securities Act of 1933) ("[The Securities Act is] designed to protect the public from financial racketeering of ... investment bankers. . . ."). Similar to our experience in today's world, which has witnessed a literal Crusade of

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American society and business which led to RICO's enactment in 1970 have not abated; if anything, they have worsened in recent years,[18] and state law jurisprudence has continually proved ineffective to combat, much less deter, such wrongdoing.[19] Given these uncontested trends, it would be unconscionable to impose *any* limitation on RICO.

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special interest groups trooping to Capitol Hill seeking to "reform" RICO, the special interests of the 1930's repeatedly sought to repeal or modify the Securities Act, suggesting that the legislation was so "draconian" that it would "dry up the nation's underwriting business and that 'grass would grow on Wall Street.' " D. Ratner, *Securities Regulation in a Nutshell*, §11, at 80 (2d ed. 1982). History has proven the value of the Securities Act, along with the Securities Exchange Act of 1934, in policing the securities marketplace. The history of civil RICO, which is being written in numerous pending actions (including *ACC/Lincoln*) where defrauded investors seek redress against organized criminal and fraudulent activity, will also prove the value of this remedial statute.

18 The Chief Justice has stated that "[w]hite-collar crime is 'the most serious and all-pervasive crime problem in America today.' " *Braswell v. United States*, 487 U.S. 99, 115 n.9 (1988) (quoting Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 Am. Crim. L. Rev. 287, 288 (1980)). The Chief Justice added, "Although this statement was made [by Representative Conyers] in 1980, there is no reason to think the problem has diminished in the meantime." *Id.* Indeed, a substantial body of literature demonstrates the continuing prevalence of white collar crime in corporate America. *See, e.g.*, Ross, *How Lawless Are Big Companies*, Fortune, Dec. 1, 1980, at 57 (1,043 major corporations indicated between 1970 and 1980: 117 convictions or consent decrees for 98 antitrust violations; 18 kickbacks, briberies, or illegal rebates; 21 illegal political contributions; 11 frauds; and five tax evasions). Given the experience of Wall Street alone in the recent past, it cannot be seriously contended that these figures would be smaller for the greed-riddled 1980's.

19 When Congress enacted RICO in 1970, it was because it found 18th and 19th century jurisprudence ineffective to combat fraud, as clearly demonstrated by the Statement of Findings enumerated as a preface to the Organized Crime Control Act of 1970, *see* 84 Stat. 923 (observing that existing "sanctions and remedies . . . [were] unnecessarily limited in scope and impact"); *see also United States v. Turkette*, 452 U.S. 576, 586 (1981) (Congress's view in enacting the statute "was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions").

The rampant abuse of the public securities markets which the recent scandals, indictments, guilty pleas and/or criminal proceedings evidence demonstrate that the limitation on the statute which Petitioner champions would be especially damaging to the interests of innocent investors who are victimized in securities fraud schemes.

Although Petitioner and various *amicus curiae* who support his position contend that defrauded investors can secure adequate relief through claims brought under the federal securities laws, NASCAT's experience has been quite different. Indeed, the factual scenario which was recently before this Court in *Tafflin v. Levitt*, 865 F.2d 595 (4th Cir. 1989), *aff'd*, 110 S. Ct. 792 (1990), illustrates the point. In *Tafflin*, litigation that grew out of the catastrophic failure of Old Court Savings & Loan in Maryland, depositors sued for damages under the federal securities statutes and RICO. The Fourth Circuit, however, held that the "certificates of deposit" which plaintiffs had purchased were not "securities" under this Court's decision in *Marine Bank v. Weaver*, 455 U.S. 551 (1982). The Fourth Circuit then "abstained" on the civil RICO claim and remanded it to state court. *Tafflin v. Levitt*, 865 F.2d at 599-600. In that situation, the federal securities laws provided no haven to defrauded investors.

In an effort to avoid such tragic results, pending cases brought by government agencies (including SIPC, the FDIC and the RTC)[20] and the innocent investors whom RICO was

[20] Consistent with the President's pledge that lost funds would be restored and perpetrators punished, *see President's News Conference on Savings Crisis and Nominees*, N.Y. Times, Feb. 7, 1989, at D8, col. 1 (President Bush promises "every effort to recover losses diverted from these institutions and to place behind bars those who had caused losses through criminal behavior"), the Government is bringing criminal RICO prosecutions and the FDIC and FSLIC (now the RTC) are using RICO to sue banks and thrift fraud perpetrators, *see, e.g., In re American Continental Corp./ Lincoln Savings & Loan Securities Litigation*, MDL Docket No. 834 (D. Ariz. pending) (RTC prosecuting civil suit against Keating and his cohorts under federal and Arizona RICO statutes); *U.S. Regulators Sue Owners in*
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expressly enacted to protect illustrate the importance of its remedial provisions, which offer the potential recovery of treble damages and reasonable attorneys' fees to persons victimized by statutory violations. *See* 18 U.S.C. §1964(c). As set forth below, this Court has repeatedly and justly recognized that RICO's remedial provisions were expressly designed to encourage civil enforcement of its racketeering prohibitions. Given the inadequate prosecutorial resources available[21] to combat "white-collar" crime and fraud which

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Big Savings Unit Failure, N.Y. Times, Sept. 16, 1989, at 33, col. 1 (reporting filing of RTC's suit against Keating, *et al.* and allegation that collapse of Lincoln Savings would cost the taxpayers more than $2 *billion*).

[21] Fifty years ago, Justice Jackson observed that the criminal law has "long proved futile to reach the subtler kinds of fraud at all, and [is] able to reach grosser fraud, only rarely." R. Jackson, *The Struggle for Judicial Supremacy* 152 (1941). History has proven the wisdom of his words. It is doubtful that public agencies will ever be funded at adequate levels to carry out their oversight and prosecutorial responsibilities. *See* Labaton, *The S.E.C.'s Top Cop Moves On*, N.Y. Times, May 21, 1989, §3, at 1, col. 2 (reporting the resignation of SEC enforcement director Gary Lynch and evaluating the agency's efforts: of 650 people employed in Washington, D.C., and nine regional offices, 15% of the resources are devoted to insider trading, 15% to 20% to market manipulations, 25% to improper disclosure, and the rest to other problems); Sontag, *"Desperate" SEC Seeks More Aid*, Nat'l L. J., May 1, 1989, at 1, col. 4, (analyzing the size of the securities markets, the number of transactions, dealers and staff resources over the previous ten years and stating that the "agency [is] becom[ing] dangerously unable to keep pace"); *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1990: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 101st Cong., 1st Sess., pt. 6, at 173 (1989) (Statement of David S. Ruder, chairman of the SEC, requesting an increase from the $135 million appropriated in 1988 and the $143 million estimated in 1989 to $169 million for 1990); at 208-09 (reporting that investor complaints, "which have increased significantly in recent years . . . are a traditional indicator of potential fraud. In 1987, the [SEC] received over 40,000 complaints and inquiries from investors, over 230% the number received in 1982").

are rampant in our society,[22] civil RICO has been (and remains) a tool of critical importance. Its use cannot — and should not — be inhibited or otherwise limited in securities fraud or consumer fraud cases. For the reasons stated herein, we respectfully urge this Court to affirm the decision of the Ninth Circuit and to reject the unjust limitation on RICO's deliberately broad reach sought by Petitioner.

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[22] Whether one speaks of "white-collar" crime, "organized" crime, or fraud, one refers to the same pervasive horror which has been inflicted upon our society. Writing in 1967, the Katzenbach Commission, whose studies led to RICO's proposal and enactment a few years later, noted the broad definition applicable to so-called "white collar" and "organized" crime, as well as the impact upon society when such wrongdoing goes unpunished:

> [W]hite-collar crime [is] — a term now commonly used to designate those occupational crimes committed in the course of their work by persons of high status and social repute [that] . . . are only rarely dealt with through the full force of criminal sanctions. . . . Serious erosion of morals accompanies [the white collar offender's] violation. [Those who so] flout the law set an example for other businesses and influence individuals, particularly young people, to commit other kinds of crime on the ground that everybody is taking what he can get.

President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 47-48 (1967). Unfortunately, this pattern of lawlessness has been present throughout much of modern history and it shows no sign of abating. Writing in the early days of this century, Louis Brandeis prophetically stated, "The goose that lays the golden eggs has been considered a most valuable possession. But even more profitable is the privilege of taking the golden eggs laid by someone else's goose." L. Brandeis, *Other People's Money* 17-18 (1914).

B. REFERENCE TO RICO'S STATUTORY LANGUAGE, INCLUDING THE STATUTE'S LIBERAL CONSTRUCTION CLAUSE, DEMONSTRATES THAT CONGRESS INTENDED RICO TO BE AN EFFECTIVE WEAPON AGAINST FRAUDULENT ACTIVITY OF ALL KINDS, INCLUDING SECURITIES AND CONSUMER FRAUD

Reference to RICO's statutory language (including its liberal construction clause),[23] its legislative history and the decisions of this Court in previous civil and criminal RICO cases lead to the unavoidable conclusion that the statute must be broadly and liberally construed to effectuate a paramount public policy: the eradication of organized criminal[24] and

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[23] Section 904(a) of RICO, 84 Stat. 947, directs that "[t]he provisions of this Title shall be liberally construed to effectuate its remedial purposes." As this Court noted in *Russello v. United States*, 464 U.S. 16, 27 (1983), RICO is the "only substantive federal criminal statute that contains such a directive." For commentary on RICO's liberal construction clause, *see* Note, *RICO and the Liberal Construction Clause*, 66 Cornell L. Rev. 167 (1980); Note, *Liberal Construction of Title IX of the Organized Crime Control Act of 1970: Section 904(a) v. The Doctrine of Strict Construction*, 12 Rutgers L. J. 69 (1980). In addition, the Senate and House Reports accompanying RICO expressly stated that Section 1962(c)'s prohibitions are without limitation or exception. *See* Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 159 (1969); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 4033 (1970).

[24] As this Court has previously noted, RICO's "legislative history clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello*, 464 U.S. at 28. Although the major purpose of Title IX was "to address the infiltration of legitimate business by organized crime," *Turkette*, 452 U.S. at 591, RICO was not limited to the prohibition of infiltration of legitimate organizations. *Id.* at 590. Nor does RICO apply only to organized crime in the classic "mobster" sense. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985) ("not just mobsters"). Accordingly, this Court has justly resisted the blandishments of those like

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fraudulent[25] activity in each of its despicable manifestations.

There is no logical basis upon which RICO's express statutory language[26] and Congress's clearly expressed

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Petitioner who would seek to limit RICO's reach to "organized crime" in the traditional sense. Just two years ago, this Court rejected a full-court press from various *amici* aligned with the accounting profession, finding that their arguments for reading an organized crime limitation into RICO's "pattern" concept "finds no support in the Act's text, and is at odds with the tenor of its legislative history." *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2903 (1989). As this Court noted, Section 1961(1) of RICO, with its purposefully broad definition of "racketeering activity," acknowledges the "breakdown of the traditional conception of organized crime, and responds to a new situation in which persons engaged in long-term criminal activity often operate *wholly* within legitimate enterprises." Consequently, Congress drafted the statute "broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *Id.* at 2905 (emphasis in original).

25 While RICO may have been aimed at "organized crime," its use "as a weapon against 'white collar crime' . . . is not contrary to the intent of Congress but is in fact one of the 'benefits' Congress saw the Act as providing." *Papai v. Cremosnik*, 635 F. Supp. 1402, 1411 (N.D. Ill. 1986) (citation omitted). In the admirable (and oft-quoted) words of Judge Pratt of the Second Circuit:

> [Congress] provided no exception for businessmen, for white collar workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as "garden variety fraud", we can only conclude that by the RICO statute Congress has provided an additional means to weed that "garden" of its fraud.
>
> It seems almost too obvious to require statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm.

Furman v. Cirrito, 741 F.2d 524, 529 (2d Cir. 1984) (Pratt, J., dissenting). Given the experience on Wall Street in recent years, it would seem academic to compare the wrongdoing of investment bankers and inside traders with Mafia "wiseguys."

26 Section 1962 of RICO is enforced by private suits brought under Section 1964(c), which provides that "[a]ny person injured in his business or property by reason of a violation of section 1962" may sue. 18 U.S.C. §1964(c). The statutory definition of "person" includes "any individual or (continued)

legislative intent can be interpreted by this Court to support the restriction which is sought by Petitioner in this case. The issue before this Court concerns whether the purchaser-seller standing requirement imposed by the courts in actions brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1982), and SEC Rule 10b-5, 17 C.F.R. §240.10b-5 (1991), should apply to plaintiffs bringing civil RICO actions based (most often) upon predicate acts of mail fraud, wire fraud and "fraud in the sale of securities."

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entity capable of holding a legal or beneficial interest in property." *Id.* §1961(3). The plain language of the statute, therefore, does not impose the "purchaser or seller" limitation sought by Petitioner on "any person." *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1100 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1642 (1989) (holding that there is "no special limitation on standing").

Congress explicitly stated the only limitations on civil recovery under RICO: the "person" must show that his "business or property" was "injured." *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 285 (3d Cir. 1991). In addition, as this Court recognized, "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. . . . But the statute requires no more than this." *Sedima*, 473 U.S. at 496-97; *see also Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987) (holding that it is wrong to require a plaintiff to show more).

If Congress had intended to limit the class of persons entitled to sue to enforce RICO's remedial provisions, narrowing the definition of "person" was all it took to achieve that objective; in the words of this Court, Congress could have "narrowed the sweep of the definition by inserting a single word." *Turkette*, 452 U.S. at 581 (discussing the definition of "enterprise"). Indeed, the short answer to Petitioner's contention is that " 'Congress did not write the statute that way,' " *United States v. Monsanto*, 109 S. Ct. 2657, 2664 (1989) (holding that "all property" does not exclude funds for legal fees) (quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979)), and this Court has repeatedly rejected similar attempts to rewrite RICO. *See Northwestern Bell*, 109 S. Ct. at 2902-05 (holding that "pattern" is not limited to organized crime-type perpetrators); *Sedima*, 473 U.S. at 495 (holding that "any person" is not limited to "mobsters"); *Russello*, 464 U.S. at 21-22 (concluding that "any interest" is not limited to "interest in enterprise"); *Turkette*, 452 U.S. at 580-81 (holding that "any enterprise" is not limited to an "illegal enterprise").

Because the judiciary implied a private right of action in SEC Rule 10b-5, this Court saw fit to impose an implied standing rule in such cases. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1975). Section 1964(c)'s right of action, however, is express and any judicial limitation on its scope (such as an implied standing rule) would be inappropriate. As this Court expressly recognized in *Blue Chip Stamps*:

> [I]f Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.

421 U.S. at 748. This reasoning was adopted by the court below; in the words of the Ninth Circuit in this case:

> With regard to the RICO statute . . . the private civil action for violation of it was not created by the courts, but by Congress in enacting the statute. The RICO statute contains no limitation that a plaintiff must be a purchaser or seller of a security, and it is not appropriate for this court to impose such a limitation.

Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461, 1466 (9th Cir. 1990) (citing *Blue Chip Stamps*).[27]

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[27] The wisdom of the Ninth Circuit's reasoning was recently recognized by the Third Circuit when it held that a plaintiff had standing to allege that defendant's continued use of a design in defiance of a court order violated RICO, even though plaintiff was not a party to the divestiture order which provided the basis for the civil RICO claim. *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d at 286. Further, no language in the mail or wire fraud statutes, 18 U.S.C. §§1341 and 1343, authorizes reading into them "purchaser or seller" limitations. The purposes of the two statutes, taken together, is to prohibit schemes or artifices to defraud which utilize the mails or interstate wire communications. *See Parr v. United States*, 363 (continued)

As set forth below, Congress was certainly aware of potential overlap between RICO and the securities statutes because the point specifically was drawn to its attention during legislative debates. *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 272-73 (1982). Given the clarity of RICO's legislative history, the judiciary must not limit liability by imposing standing requirements beyond those contained in the express language of the statute. In the words of this Court, such judicial license "is a form of statutory amendment [in]appropriately undertaken by the courts." *Sedima*, 473 U.S. at 500 (holding that injury is not limited to racketeering-type injury). In *Sedima*, this Court also observed that any necessary "correction must lie with Congress," if there is "a defect" in the statute. *Id.* at 499. More recently, this Court reiterated that "rewriting [RICO] is a job for Congress, if it is so inclined, and not for [a court]." *Northwestern Bell*, 109 S. Ct. at 2905. Petitioner offers no compelling reason for this Court to abandon its civil and criminal RICO precedent.

As this Court has previously (and repeatedly) recognized, RICO was an "aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima*, 473 U.S. at 498 (citing *Russello*, 464 U.S. at 26-29). To effectuate this purpose, "RICO is to be read broadly." *Sedima*, 473 U.S. at 497. This is the lesson "not only of Congress' self-consciously expansive language and overall approach," *Id.* at 497-98, (citing *Turkette*, 452 U.S. at 586-587), "but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.' " *Sedima*, 473 U.S. at 498 (quoting Pub. L. 91-452, §904(a), 84

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U.S. 370, 389 (1960). The statutes say nothing about "purchasers or sellers."

Stat. 947). As this Court also recognized in *Sedima*, "if Congress' liberal-construction mandate is to be applied anywhere," it is in Section 1964(c), "where RICO's remedial purposes are most evident." 473 U.S. at 491 n.10. *See also Tafflin*, 110 S. Ct. at 799.

The parallels between RICO and the Sherman and Clayton Acts cannot be ignored.[28] Sections 1964 and 1965, RICO's civil enforcement mechanisms, were modeled on (but are not identical to) the antitrust laws.[29] As with comparable provisions of the Sherman and Clayton Acts, however, RICO's civil remedy provisions create a "private enforcement mechanism . . . that . . . deter[s] violators [and] provide[s] ample compensation to the victim. . . ." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982).[30] Comparing Section

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[28] As this Court, per Justice O'Connor, recognized only four years ago:

> Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury "in his business or property by reason of" a violation.

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987).

[29] *See* S. Rep. No. 617, 91st Cong., 1st Sess. 81 (1969); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56-70 (1970). Although this Court observed in *Sedima* that the "clearest current" in RICO's legislative history "is the reliance on the Clayton Act model," 473 U.S. at 489, Congress drafted and enacted RICO outside of the antitrust laws because it wanted the statute to have a *broader* impact. *Id.* at 498-499. *See also Malley-Duff*, 483 U.S. at 151-52 (summarizing RICO's legislative history).

[30] The Sherman and Clayton Acts have been aptly termed by this Court "the Magna Carta of free enterprise." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). They are "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedom." *Id.* Under the antitrust laws, the private treble damages remedy is needed "precisely for

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1964(c) of RICO to Section 4 of the Clayton Act, this Court stated that the legislative history of the former "reveals the same emphasis on the remedial role of the treble-damages provision." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 240 (1987). Just as the Clayton Act's treble damages provision "gives private parties an incentive to bring civil suits that serve to advance the national interest" in a competitive economy, Congress "sought to provide vigorous incentives for plaintiffs to pursue RICO claims that would advance society's fight" against criminal and fraudulent activity. *Id.* at 241. Section 1964(c)'s allowance of treble damages is supported by modern economic theory and analysis[31] and it provides necessary incentives that

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the purpose of encouraging *private* challenges to antitrust violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (emphasis in original). RICO and the Sherman and Clayton Acts are well integrated because "[t]here are three possible kinds of force which a firm can resort to: violence (or the threat of it), *deception*, or market power." C. Kaysen & D. Turner, *Antitrust Policy* 17 (1959) (emphasis added). *See also American C & L Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exercised through force or fraud or agreement"). RICO focuses on the first two means while the antitrust laws focus on the third. As the antitrust laws seek to maintain economic freedom in the market place, RICO seeks to promote, among other things, integrity in the market place.

[31] Both law and economics support the wisdom of allowing defrauded private plaintiffs to recover treble damages in civil RICO suits. Indeed, Professor (now Judge of the Seventh Circuit) Posner supports the concept of private enforcement mechanisms allowing the recovery of more than actual damages in cases alleging deliberate antisocial conduct, particularly where defendants have attempted to conceal their wrongdoing. R. Posner, *Economic Analysis of Law* 560 (private enforcement), 194, 346 (more than actual damages recoverable for deliberate conduct), 293 (concealment) (3d ed. 1986). It is widely recognized that concealment is the hallmark of most types of fraudulent conduct. *See* General Accounting Office, *Fraud in Government Programs — How Extensive Is It? — How Can It Be Controlled?*, cover page (1980) ("Most fraud is undetected. For those . . . committing fraud, the chances of being prosecuted and eventually going to jail are slim. . . . The sad truth is that crime against the Government often does pay").

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encourage civil litigants to vindicate their rights, as well as the rights of others who have been similarly victimized.[32] Indeed, RICO's incentive of treble damages and attorney's fees is integral to Congress's expressed intent to enlist the aid of government agencies and private persons[33] in deterring organized criminal and fraudulent activity in all of its manifestations. In addition, as this Court has recognized in analogous circumstances, such private litigation "is one of the surest weapons for effective enforcement" of the law, *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965), and it "provides a significant supplement to the limited resources

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Accord, R. Posner, *Antitrust Law: An Economic Perspective* 223 (1976) ("If, because of concealability, the probability of being punished for a particular . . . violation is less than unity, the prospective violator will discount [i.e., multiply] the punishment cost by that probability in determining the expected punishment cost for the violation").

32 Echoing this Court's statements, *see Malley-Duff*, 483 U.S. at 151, *McMahon*, 483 U.S. at 241, the lower federal courts have recognized that RICO's treble damages provision provides a necessary incentive for private plaintiffs to bring civil RICO actions. *See Mosler v. S/P Enters., Inc.*, 888 F.2d 1138, 1143-44 (7th Cir. 1989) (citation omitted); *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 399 n.16 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985).

33 Studies analyzing the antitrust laws demonstrate that most treble damage private actions are now settled at close to actual damages. *See* Staff of the House Comm. on the Judiciary, 98th Cong., 2d Sess., Serial No. 8, *Study of the Antitrust Treble Damage Remedy* 15 (Comm. Print 1984). Empirical studies show that it is the threat of treble damages, not criminal prosecution, that is the backbone of antitrust enforcement. *See* Block, Nold & Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. Pol. Econ. 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose . . . a credible threat to colluding firms. . . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages. . . ."). Experience suggests that a similar pattern is developing under RICO and that it is necessary to authorize treble damages in order to assure that deserving victims receive *actual* damages. *See* Blakey & Perry, 43 Vand. L. Rev. at 919; *McMahon*, 482 U.S. at 240 ("The legislative history of §1964(c) reveals the same emphasis on the remedial role of the treble-damages provision"); Note, *Treble Damages Under RICO: Characterization and Computation*, 61 Notre Dame L. Rev. 526, 533-34 (1986).

available to the government." *Reiter*, 442 U.S. at 344.[34] As this Court concurred in *Sedima*, "[p]rivate attorney general provisions such as §1964(c) are in part designed to fill prosecutorial gaps." 473 U.S. at 493 (citation omitted).

Given this paramount and clearly expressed public policy behind the statute, this Court has resisted repeated attempts by various special interests who would seek to restrict RICO's justifiably broad reach. *See, e.g., Tafflin*, 110 S. Ct. at 799 (state courts have concurrent jurisdiction over civil RICO cases; noting that "concurrent state court jurisdiction over civil RICO claims will advance rather than jeopardize federal policies underlying the statute"); *Northwestern Bell*, 109 S. Ct. at 2898-2902 (refusing to require proof of multiple "schemes" to establish a "pattern of racketeering activity"); *Malley-Duff*, 483 U.S. at 146-155 (four-year statute of limitations borrowed from antitrust laws applies in civil RICO actions); *Sedima*, 473 U.S. at 488-500 (rejecting prior conviction and racketeering injury requirements). There is no logical reason why this case should produce a different result.

34 For example, between 1960 and 1980, of the 22,585 civil and criminal antitrust cases brought under the Sherman and Clayton Acts by the government or private parties, 84% we instituted by *private* plaintiffs. *See* U.S. Department of Justice, *Source Book of Criminal Justice Statistics* 431 (1981). History will undoubtedly demonstrate a similar pattern in civil cases and criminal prosecutions brought under RICO. Due to its principal reliance on the criminal law, government and law enforcement agencies cannot be expected to police every fraudulent scheme which is carried out. The limitations of the federal and state criminal justice systems in the area of white collar crime have long been acknowledged by many commentators. *See*, J. Conklin, *Illegal But Not Criminal: Business Crime in America* 129 (1977). *Cf.* Fedders & Perry, *Policing Financial Disclosure Fraud: The SEC's Top Priority*, 1984 J. of Acct. 58, 60 ("Because certain conduct violates the federal securities laws does not mean that the [SEC] must file charges and seek to impose sanctions on the malefactor").

C. RICO'S LEGISLATIVE HISTORY DEMONSTRATES THAT THE STATUTE WAS INTENDED TO SUPPLEMENT EXISTING LAW TO PROVIDE ADDITIONAL AND NECESSARY REMEDIES FOR INNOCENT INVESTORS WHO ARE DEFRAUDED, INCLUDING VICTIMS OF SECURITIES FRAUD SCHEMES

While RICO's language must "ordinarily be regarded as conclusive," it can give way to a "clearly expressed legislative intention" to the contrary found in the statute's legislative history. *Consumer Product Safety Commmission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case, however, reference to RICO's extensive legislative history[35]

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[35] RICO "has a long legislative lineage," *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir. 1986), which has previously been documented by this Court, *see Malley-Duff*, 483 U.S. at 151-52; *McMahon*, 482 U.S. at 240-41; *Sedima*, 473 U.S. at 487-88, as well as by commentators. *See generally* ABA Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Civil RICO Task Force* 70-126 (1985) ("*ABA Report*"); Blakey, 58 Notre Dame L. Rev. at 249-80. RICO's roots lie in the investigations carried out by the Copeland Committee in the 1930's, by the Kefauver Committee in the early 1950's, the work of the American Bar Association's Commission on Organized Crime in the same decade, the investigations of the McClellan Committee in the early 1960's, President Johnson's Commission on Law Enforcement and Administration of Justice (the Katzenbach Commission), which issued an influential report in 1967, and the work of the National Commission on Reform of the Federal Criminal Law (the Brown Commission) in the late 1960's. *See ABA Report*, 72-78, 82-83. In 1967, Senator Hruska and Representative Poff introduced bills in the Senate (S. 2048 and S. 2049) and House (H.R. 11266 and 11268), respectively, which sought to adapt antitrust concepts to thwart organized crime. *Id.* at 78-80. The ABA's Section of Antitrust Law issued a report endorsing the Senate bills, but commented that the legislation should not be enacted in the body of the antitrust laws so that private litigants would not have to contend with the body of Sherman Act and Clayton Act precedent establishing unreasonable standing and proximate

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confirms that "Congress meant what it said," *INS v. Phinpathya*, 464 U.S. 183, 193 (1984), and demonstrates Congress's express intent to provide a civil remedy beyond that already provided by statute and the common law to the victims of fraud, including "innocent investors" and competitors.[36]

The civil remedies in the bill eventually passed by the Senate, S. 30,[37] were limited to injunctive actions brought

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cause hurdles. No action was ever taken by Congress on these bills. *Id.* at 80-82.

[36] The Statement of Findings enumerated by Congress as a preface to the Organized Crime Control Act of 1970 recognized that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, *fraud*, and corruption", that organized crime activities in this country "weaken the stability of the Nation's economic system, *harm innocent investors and competing organizations*, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens" and that organized crime "continues to grow" because "the sanctions and remedies available to the Government are unnecessarily limited in scope and impact." In light of these findings it was the declared purpose of Congress "to seek the eradication of organized crime in the United States" by "providing enhanced sanctions and new remedies to deal with" its unlawful activities. 84 Stat. 922-23 (emphasis added); *see also Turkette*, 452 U.S. at 588-89 (quoting RICO's Statement of Findings).

[37] S. 30, the Organized Crime Control Act, 91st Cong., 1st Sess., 115 Cong. Rec. 769 (1969), which was introduced by Senator McClellan in January, 1969, to implement some of the recommendations set forth in the Katzenbach Commission's report, was originally designed as an extensive criminal law reform measure; it did not contain a RICO-type provision. *See* Blakey, 58 Notre Dame L. Rev. at 256-58; Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Civil and Criminal Remedies*, 53 Temp. L. Q. 1009, 1017 (1980). In a major speech which he delivered in the Senate on March 11, 1969, however, Senator McClellan reviewed the development of organized crime in the United States and stressed that S. 30 was designed to address the failure of traditional laws and law enforcement procedures to arrest its growth. 115 Cong. Rec. 5872 (1969). *See also ABA Report*, 84.

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by the Government and became present Section 1962(a), (b) and (d) of RICO. *See Sedima*, 473 U.S. at 486-87. Although S. 30 did not provide an express private civil remedy,[38] during deliberations in the Senate Judiciary Committee its list of predicate offenses was expanded to include mail fraud, wire fraud and securities fraud[39] because the SEC and other

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Shortly thereafter, Senator Hruska introduced S. 1623, the Criminal Activities Profits Act, while Representative Poff introduced a parallel bill, H.R. 9327, in the House. Designed to synthesize the earlier legislation which had failed, S. 1623 was drafted outside the scope of the antitrust statutes to satisfy the ABA's comments. *Id.* at 85. As introduced, S. 1623 contained express provisions for treble damages and private equitable relief. *Id.* at 86-87; 115 Cong. Rec. 6993-6996. The bill did not contain in its definition of "criminal activity" either mail fraud, wire fraud, or securities fraud. *ABA Report*, 87 & n.100.

After Senate hearings were held on S. 30 and S. 1623, the bills were synthesized as S. 1861, the Corrupt Organizations Act, while a parallel bill (H.R. 10312) was again introduced in the House. *Id.* at 87. In an effort to streamline the Senate bill, S. 30's provisions for treble damages and injunctive relief were dropped. *Id.* at 88-89. S. 1861 was subsequently incorporated by amendment into S. 30, becoming in the process Title IX (entitled "Racketeer Influenced and Corrupt Organizations") of the Organized Crime Control Act of 1969, RICO's immediate predecessor. *Id.* at 89. S. 30 was reported out of the Senate Judiciary Committee in December, 1969. After debate, the bill was passed by the Senate by a vote of 73 to 1 in early 1970 and was sent to the House for its consideration. *Id.* at 91-97, 105-106; 116 Cong. Rec. 972 (1970).

38 Given the state of the law in 1970, however, it is certain that a private cause of action would have been implied by the courts. *See Blue Chip Stamps*, 421 U.S. at 730; *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964); Blakey, 58 Notre Dame L. Rev. at 262 n.71.

39 The Senate Report stated that S. 30 defined racketeering activity

> to include those crimes most often associated with organized crime, especially those associated with the infiltration of legitimate organizations. Those crimes are murder, kidnapping, gambling, arson, robbery, bribery, extortion, narcotic violations, counterfeiting, usury, *mail, bankruptcy, wire and securities fraud*, and obstruction of justice.

Organized Crime Control Act of 1969, Sen. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) (emphasis added). *See also ABA Report*, at 97-98; Blakey, 58 Notre Dame L. Rev. at 268 (noting expansion of "racketeering (continued)

federal agencies favored their inclusion due to reports of recent stock market manipulations.[40] In the accompanying Senate Report, Senator McClellan stressed that RICO was designed to address fraudulent and criminal activities outside the traditional sphere of "organized crime," including legitimate business endeavors such as banking, accounting and the securities industry, as well as the production of counterfeit records and illicit prescription drugs. 116 Cong. Rec. 592 (1970); *see also Turkette*, 452 U.S. at 590.

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activities" in Title IX to include mail fraud, wire fraud and securities fraud, as complements to bankruptcy fraud, theft from interstate shipments and transportation of property taken by theft or fraud); 115 Cong. Rec. 9568 (1969).

40 Commentators have noted that the SEC's Enforcement Staff met with counsel to the Senate Judiciary Committee and stated that organized criminal syndicates were becoming involved in manipulations of listed securities traded on the national securities exchanges. Committee counsel thereafter persuaded the principal sponsors of the legislation (Senators McClellan and Hruska and Representative Poff) to include a full range of commercial fraud offenses (*i.e.*, mail fraud, wire fraud and securities fraud) as RICO predicate crimes. *See ABA Report* at 99 & n.130. Additionally, in March, 1969, during subcommittee hearings on S. 30, then-Attorney General Mitchell described the problem posed by stock market manipulations resulting from incidents where huge purchases and sales of securities had been made by organized crime syndicates. *See Securities Markets Agencies: Hearings on the Administration of the Laws Pertaining to the Regulation of the Securities Markets by the Administraive Agency and by the Self-Regulatory Agencies Involved Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 137 (1969) (statement and testimony of NYSE president Robert W. Haack); Glanz, *RICO and Securities Fraud: A Workable Limitation*, 83 Colum. L. Rev. 1513, 1536-1539 (1983); *ABA Report*, at 100-02. Indeed, earlier in 1967 in connection with his proposed bills S. 2048 and S. 2049, Senator Hruska had commented that "[i]n recent weeks the financial journals have carried stories of current investigations involving manipulation of listed stocks on a major exchange by persons with known underworld ties." 113 Cong. Rec. 17998 (1967).

In the House of Representatives, S. 30 was considered by the Committee on the Judiciary in early 1970. Principal objections to the bill were raised by various special interests, which fought the expansion of predicate offenses (including securities fraud) previously added.[41] During hearings on the bill when it was in committee, Representative Steiger proposed the addition of a private treble damage remedy "similar to the private damage remedy found in the antitrust laws. . . . [T]hose who have been wronged by organized crime should at least be given access to a legal remedy. In addition, the availability of such a remedy would enhance the effectiveness of Title IX's prohibitions." *Sedima*, 473 U.S. at 487 (quoting *Hearings on S. 30, and Related Proposals, Before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess. 520 (1970) ("*House Hearings*")); *see also Malley-Duff*, 483 U.S. at 152; *McMahon*, 482 U.S. at 240. In summarizing the bill on the House floor, Representative Poff described the treble damages provision as "another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. 35295 (1970). The proposal found institutional support, as even the American Bar Association proposed an amendment

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[41] For example, the Association of the Bar of the City of New York expressly objected to the RICO provision because it included as predicate offenses a number of criminal activities, including securities fraud, which it claimed were not characteristically engaged in by members of organized crime. *See ABA Report*, at 111 & n.157. Similarly, the New York County Lawyers Asssociation objected to the breadth of the offenses included in S. 30's definition of "racketeering activity," including "fraud in the sale of securities":

> Against the background of expanding securities regulation, this definition could include the various officers, directors and employees of corporations and underwriters who have been found guilty of fraud in the sale of securities in some of the recent Rule 10(b)5 cases. Fraud in the sale of securities is simply not synonymous with racketeering activity. . . .

Id. at 111-12 (footnote omitted). *See also* Blakey, 58 Notre Dame L. Rev. at 272-73 & nn.111-12.

to S. 30 "based upon the concept of Section 4 of the Clayton Act." *Malley-Duff*, 483 U.S. at 152 (quoting *House Hearings*, at 543-44); *see also McMahon*, 482 U.S. at 240 (commenting that the legislative history of Section 1964(c) reveals an "emphasis on the remedial role of the treble damages-provision"); 116 Cong. Rec. 25190-25191 (1970); *ABA Report*, at 113 & n.167. Senator McClellan acknowledged that the proposal of a private treble damage remedy was a "constructive contribution" to S. 30 and the House Judiciary Committee adopted the amendment before favorably reporting on S. 30 in September, 1970.[42] The House then passed the bill by a vote of 341 to 26 with the treble damages remedy provision in the form recommended by the Committee and sent the bill back to the Senate. 116 Cong. Rec. 35363, 36280, 36293-96 (1970). The Senate did not seek a conference and adopted the bill as amended in the House. *See Sedima*, 473 U.S. at 488; 116 Cong. Rec. 36280-96 (1970).

Hence, a careful reading of RICO's legislative history reveals Congress's deliberate inclusion of what are often termed "commercial fraud" offenses — mail fraud, wire fraud, "fraud in the sale of securities" and interstate transportation of property obtained by fraud — within the statute's enumeration of predicate acts as a result of (among other reasons) the SEC's concern over market manipulations. Further, the legislative history makes clear Congress's

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[42] In the words of the *Sedima* Court:

> The treble-damages provision had been drawn to [the Senate's] attention while the legislation was still in the House, and had received the endorsement of Senator McClellan, the sponsor of S. 30, who was of the view that the provision would be "a major new tool in extirpating the baneful influence of organized crime in our economic life."

Sedima, 473 U.S. at 488 (quoting 116 Cong. Rec. 25190 (1970)); *see also* H.R. Rep. No. 1549, 91st Cong., 2d Sess. at 58 (1970) (committee approval); *ABA Report*, at 116; Blakey, 58 Notre Dame L. Rev. at 275-76 & nn.114, 116-17.

emphasis on the remedial role of the treble damages provision; the policing function of Section 1964(c), although important, was only of secondary concern. *See McMahon*, 482 U.S. at 240-41. This Congressional focus on the remedial function of the treble damages provision is reinforced by the recurrent references in the legislative debates to Section 4 of the Clayton Act as the model for RICO's private remedy section. *Id.* at 241. Given the clarity of this statutory background, it is not for this Court to eliminate or otherwise limit the private action. *See Sedima*, 473 U.S. at 499-500; *cf. Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980) (Article III does not grant a court power to redraft legislation because of its "appraisal of the wisdom and unwisdom of a particular [legislative] course"). Consequently, RICO's legislative history provides no basis for the extreme limitation sought by Petitioner.

CONCLUSION

NASCAT respectfully urges this Court to resist Petitioner's entreaties to restrict RICO's deliberately broad reach. In these times of widespread financial chicanery which have threatened such institutions as the savings and loan and insurance industries, including fraudulent and criminal schemes which have repeatedly robbed our most vulnerable citizens — impoverished and elderly Americans — any attempt to limit RICO must be strenuously resisted so that it can continue to fulfill the noble purpose which Congress charted a generation ago.

DATED: July 8, 1991.

Respectfully submitted,
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